

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SIX KILNS APARTMENTS, LLC,

Petitioner,

v.

CITY OF SUMNER,

Respondent.

CASE No. 13-3-0005

(Six Kilns)

ORDER OF DISMISSAL ON MOTIONS

This matter came before the Board on Petitioner's motion to supplement the record and on Respondent's dispositive motion seeking dismissal for lack of jurisdiction.

Petitioner Six Kilns Apartments LLC (Six Kilns) challenges the City of Sumner's (City) adoption of Substitute Resolution No. 1378 declaring the Sumner Meadows Golf Course (Golf Course) surplus to the City's needs and authorizing negotiation for sale of the property pursuant to RCW 35.94.040.

I. MOTION TO SUPPLEMENT THE RECORD

Six Kilns moves to supplement the record with 11 documents, to which the City objects. In deciding this motion, the Board has before it:

- [Six Kilns'] Motion to Supplement the Record, June 13, 2013
- City of Sumner's Response to Motion to Supplement the Record, June 26, 2013
- [Six Kilns'] Reply on Supplementation, July 3, 2013

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city ... and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

1 Six Kilns' motion points out this case involves two key issues: whether the Resolution
2 is a *de facto* comprehensive plan amendment because it authorizes elimination of
3 designated open space to be replaced with industrial development; and whether SEPA
4 review of the Resolution improperly piecemealed environmental analysis and failed to
5 evaluate total impacts.

6 Proposed Exhibits 23, 24, and 25 are documents concerning potential development
7 on the Golf Course site:
8

- 9 • Ex. 23: Barghausen Engineers Conceptual Site Plan for Industrial Warehouse
10 Build-Out of Golf Course Property prepared for City of Sumner, February 5, 2013
- 11 • Ex. 24: PanGeo Geotechnical Engineers Geotechnical Evaluation of Golf Course
12 Site, February 4, 2013
- 13 • Ex. 25: Colliers Offering Memorandum (undated) for Sumner Meadows
14 Development Site
15

16 The Board finds these materials of substantial assistance in its analysis and decision
17 concerning the "de facto amendment" issue. Exhibits 23 and 24 were prepared for the City
18 and in its files prior to adoption of the Resolution. Whether or not they were presented to
19 City Council members seems to the Board to be immaterial to a finding that the documents
20 were part of the City's records in this matter. Exhibit 25 was prepared shortly after adoption
21 of the Resolution. Ordinarily the Board does not admit post-adoption documents; an
22 exception is made in this case to ensure the Board is fully informed in view of the finality of
23 the decision on jurisdiction.
24

25 Proposed Exhibits 23, 24, and 25 are **admitted**.

26 Proposed Exhibits 26-33 are primarily documents concerning the Six Kilns
27 development:
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- 29 • Ex. 26: Development Agreement Between City of Sumner and Greenwater LLC,¹
30 February 6, 2009
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¹ Six Kilns LLC is the successor to Greenwater LLC as owner of the Six Kilns property.

- Ex. 27: City of Sumner Hearing Examiner Report and Recommendation on Six Kilns Site, February 7, 2013
- Ex. 28: Six Kilns Clear and Grade Permit Set Approved by City of Sumner, June 8, 2009
- Ex. 29: City of Sumner Final Assessment Roll ULID 2007-01, January 25, 2013
- Ex. 30: Ordinance 2276, adopted December 1, 2008
- Ex. 31: Staff Report Excerpt on Ordinance 2276
- Ex. 32: Application of Greenwater LLC to City regarding Comprehensive Plan Amendment, May 13, 2008
- Ex. 33: Aerial Photos, February 2009 and July 2010

These materials document the City's actions concerning the Six Kilns project, from a comprehensive plan amendment for the Six Kilns property in 2008 (Ex. 30, 31, 32) to a hearing examiner recommendation in February 2013 (Ex. 27). Six Kilns offers the documents to demonstrate the major impacts on neighboring properties of the Resolution's elimination of the Golf Course as public open space.

The Board finds these materials might well be germane to Six Kilns' issues concerning SEPA review and the totality of development impacts. However, in light of the Board's finding, below, that the challenge is beyond its statutory jurisdiction, Exhibits 26-33 are not necessary or of assistance.

Proposed Exhibits 26-33 are **denied**.

II. MOTION TO DISMISS

The City moves to dismiss the petition contending Substitute Resolution No. 1378 (hereafter, Resolution) is beyond the scope of the Board's statutory jurisdiction. Six Kilns contends the Resolution is a *de facto* amendment of the City's comprehensive plan which the Board has jurisdiction to review.

In deciding this motion, the Board has before it:

- Respondent City of Sumner's Motion to Dismiss, June 13, 2013 (City Motion)

- Petitioner Six Kilns' Response to Respondent's Motion to Dismiss, June 26, 2013, with 20 exhibits (Six Kilns' Response)
- City of Sumner's Reply to Petitioner's Response to Motion to Dismiss, July 3, 2013 (City Reply)

Applicable Law

The Legislature has defined a limited jurisdiction for the Growth Board. RCW 36.70A.280(1) provides, in pertinent part: "The growth management hearings board shall hear and determine only those petitions alleging" that "a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [GMA] . . . or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments."

Under RCW 36.70A.290(1), the Board hears "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA, or SMA]."

"Comprehensive Plan" or "Plan" is defined in the GMA, RCW 36.70A.030(4):

"Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.

A comprehensive plan consists of a future land use map, planning elements, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The comprehensive plan itself does not directly regulate site-specific land use decisions. Rather, it is development regulations which directly control the development and use of the land. Development regulations are defined in the GMA at RCW 36.70A.030(7) and include zoning ordinances.

Thus, the jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1) and .290(1). The GMHB has jurisdiction to hear appeals of local decisions adopting or amending comprehensive plans or development regulations. In this statutory framework, the Board has previously ruled that the Board has no jurisdiction over a city's decision to

1 surplus property. In *Association to Protect Anderson Creek v. City of Bremerton*,² the Board
2 dismissed a challenge to the city's sale of surplus property within the Anderson Creek utility
3 lands, ruling that it lacked jurisdiction over surplus property issues. In *Cossalman, et al. v.*
4 *Town of Eatonville*,³ the Board again dismissed a petition challenging the City's decision to
5 sell property, this time a park identified in the City's comprehensive plan. The Board said:

6 The Resolution simply declares property surplus and authorizes its sale.
7 This is not a matter within the Board's purview. ... Regardless of
8 ownership, the Town's Plan and development regulations will govern the
9 property's ultimate use and development.⁴

10 Both *Anderson Creek* and *Cossalman* were decided before the Court of Appeals
11 ruled, in *Alexanderson v. Board of Clark County Commissioners*,⁵ that a local government
12 action could constitute a *de facto* comprehensive plan amendment bringing it within the
13 Board's jurisdiction for review. In *Alexanderson*, the Court of Appeals ruled that a
14 Memorandum of Understanding (MOU) between Clark County and the Cowlitz Tribe for
15 provision of water service to a proposed development was a *de facto* amendment to the
16 County's comprehensive plan policy prohibiting such water service. The Board had
17 dismissed the petition for lack of jurisdiction, but the Court reversed the Board and
18 remanded the matter for Board decision on the merits.
19

20 The Board has subsequently acknowledged its jurisdiction to review *de facto*
21 comprehensive plan amendments where a city or county action has the effect of
22 superseding plan provisions:
23

24 Thus, the Court of Appeals *Alexanderson* ruling requires the Board to take
25 an additional step in determining its jurisdiction where the challenged
26 action is alleged to override provisions of a comprehensive plan and
27 constitute a *de facto* amendment."⁶

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29 ² CPSGMHB Case No. 95-3-0053, Order on Bremerton's Dispositive Motions (October 18, 1995), at 9.

30 ³ CPSGMHB Case No. 05-3-0032, Order on Motions (June 20, 2005).

31 ⁴ *Id.* at 3.

32 ⁵ 135 Wn. App. 541, 144 P.3d 1219 (2006).

⁶ *Alexanderson, et al. v. City of La Center*, GMHB Case No. 12-2-0004, Order on Dispositive Motions (May 4, 2012), at 11 (Resolution to provide sewer service in violation of comprehensive plan annexation requirement); see also *Your Snoqualmie Valley v. City of Snoqualmie*, GMHB Case No. 11-3-0012, Order on Motions (March

1 In light of *Alexanderson*, the Board must address the question of its jurisdiction
2 independent of the caption of the City's action.

3
4 **Substitute Resolution 1378**

5 The challenged Resolution, on its face, does not amend the City of Sumner's
6 Comprehensive Plan. The Resolution declares the Golf Course property surplus and
7 authorizes negotiation of a purchase and sale agreement. No development is authorized by
8 the Resolution, and no change to the applicable land use designation or zoning is adopted.

9
10 The Resolution Recital B.1 states the property has a comprehensive plan designation
11 of Public-Private Utilities and Facilities. It is primarily zoned light industrial with a small
12 portion zoned commercial. These facts are not disputed by Six Kilns. Six Kilns provides as
13 an exhibit the sales brochure developed by the City's broker advertising the property as
14 ideal for an industrial warehouse complex.⁷ Industrial uses are allowed under the existing
15 zoning and comprehensive plan designation. The City acknowledges its adopted
16 amendment process must be followed if ultimate development of the property requires
17 change to either the designation or zoning.⁸

18
19 The Resolution Recital B.3 states Goal 2 of the Comprehensive Plan Parks Element
20 discusses a goal to establish a standard of 35% of the City to be in open space.⁹ The City's
21 open space, without the golf course, would be approximately 57.7%.¹⁰

22 The Resolution Recital B.4 states no level of service (LOS) standard has been
23 adopted for the Golf Course in either the comprehensive plan or the Parks and Open Space
24 Plan. The level of service standard for community parks is one acre per thousand residents
25 and, even without the golf course, the City has over 10 acres of developed community parks
26 per thousand residents.
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28
29 8, 2012), at 12-13 (Pre-annexation Agreement in direct conflict with City CP policies was a *de facto* plan
30 amendment).

31 ⁷ Six Kilns' Response, Ex. 25.

32 ⁸ City Motion, at 6.

⁹ "Open space" in this goal includes building setbacks and yards, stream and river corridors, street corridors,
as well as publicly-owned parks and trails. Resolution, Recital B.3.

¹⁰ *Id.*

1 Six Kilns has raised no facts or argument asserting sale of the Golf Course for
2 industrial or other development is contrary to either the Comprehensive Plan land use
3 designations or the levels of service applicable to parks and open space.

4 Six Kilns asserts, however, that the Resolution is a *de facto* amendment of Sumner's
5 Comprehensive Plan because it has the same effect as an amendment and it allows what
6 the Comprehensive Plan forbids.¹¹ Six Kilns contends "numerous directives" of the
7 Comprehensive Plan "require the City to preserve [the Golf Course] as a valuable
8 component of the City's Parks and Open Space inventory."¹² The Resolution directs the
9 City to sell the property for industrial development in direct contravention of the City's
10 adopted policies, according to Six Kilns.
11

12 **The City's Comprehensive Plan Policies**

13 The City of Sumner adopted an updated Comprehensive Plan in 2010.¹³ The Parks
14 and Open Space Element of the 2010 Plan incorporates by reference the Supplement to
15 Sumner Parks and Open Space Plan, June 2000 (hereafter, Parks and Open Space Plan).
16

17 The Parks Element of the Plan includes a Parks and Open Space Map identifying the
18 Golf Course as a Sumner park and contains the following relevant policies:
19

20 Goal 1. Provide and maintain a safe, attractive, and diverse park system
21 that meets the needs of the City's residents, businesses and visitors.

22 Goal 1.13. Establish the levels of service provided in the Parks and Open
23 Space Plan for park facilities.

24 Goal 2. Preserve, protect and enhance significant open space.

25 Goal 2.7. Retain City owned lands, including excess rights-of-way, for
26 open space purposes. Unnecessary lands which are surplus should be
27 provided with open space compensation as a part of the land sale.

28 Goal 2.16 Implement the components of the open space strategy provided
29 in the Parks and Open Space Plan.
30

31 ¹¹ Six Kilns' Response, at 1, citing *Alexanderson*, supra.

32 ¹² Six Kilns' Response, at 4.

¹³ The relevant portions of the Parks and Open Space Element of the 2010 Comprehensive Plan are attached to Six Kilns' Response as Ex. 12.

1 The Sumner Parks and Open Space Plan, as updated June 2000, is a "20-year
2 guideline for the planning, development, and maintenance of parks" in the City.¹⁴ The Golf
3 Course is identified as a 165-acre facility in a City-wide park inventory of 289 acres.¹⁵ No
4 LOS is established for golf facilities.¹⁶ The Open Space portion of the parks plan is dated
5 1994, without a 2000 update. The Golf Course is included as open space in the text (p.
6 120) and Open Space map (p. 105). The plan states:

7
8 A permanently protected type of open space is parks. The location of
9 parks should capitalize on protecting natural features, access to special or
10 unique areas, equitable distribution throughout the community, and
11 protection of open space character. Large scale parks, such as the golf
12 course or Riverside Park, are valuable for their large open space
13 protection qualities...¹⁷

14 The Parks Plan sets out three pages of "Open Space Strategies" including, as a City-
15 wide program, "Preservation of City-owned land of open space value."¹⁸

16 **Resolution is Not a De Facto Amendment**

17 Reviewing the cited Plan provisions, the Board does not find the Resolution requires
18 the City to take action contrary to its Plan. In the first place, the Resolution itself does not
19 approve the sale of the property. It merely authorizes the Mayor and other representatives
20 to negotiate an agreement for future Council consideration. The cases where the Board's
21 jurisdiction arises from a *de facto* amendment all involve final actions by the city or county
22 contrary to its plan - the MOU in *Alexanderson v. Clark County*,¹⁹ the Resolution to extend
23 sewer service in *Alexanderson v. La Center*,²⁰ or the Pre-Annexation Agreement in *Your*
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28 ¹⁴ Relevant portions are attached as Ex. 13 to Six Kilns' Response.

29 ¹⁵ Ex. 13, at 4.

30 ¹⁶ Ex. 13, Table 8, at 7.

31 ¹⁷ Ex. 13, at 107-108.

32 ¹⁸ Ex. 13, at 125.

¹⁹ *Alexanderson v. Clark County*, 135 Wn. App. 541, 144 P.3d 1219 (2006) (MOU to provide water service to tribal trust lands in contravention of comprehensive plan policy).

²⁰ *Alexanderson, et al. v. City of La Center*, GMHB Case No. 12-2-0004, Order on Dispositive Motions (May 4, 2012), at 11 (Resolution to provide sewer service in violation of comprehensive plan annexation requirement).

1 *Snoqualmie Valley*.²¹ Sumner's challenged Resolution is not a final action. To the extent
2 Six Kilns argues the Comprehensive Plan or Parks and Open Space Plan and
3 accompanying maps may need to be amended to remove reference to the Golf Course
4 upon sale of the property, the question is not yet ripe.

5 The Board finds the Resolution does not contravene the zoning or land use
6 designations for the property, nor is the LOS standard for parks and open space violated.
7 Further, as the Board reads the Parks Element, none of the comprehensive plan policies
8 require the City to maintain any particular park or open space regardless of cost or usage.
9 As the Board ruled in *Campbell v. City of Everett*²² and *Petso v. Snohomish County*,²³ there
10 is no basis for finding a *de facto* amendment when the challenged action is consistent with
11 provisions of the comprehensive plan.
12

13 In the Board's view, the pivotal Comprehensive Plan policy is Policy 2.7 which calls
14 for the City to "retain City owned lands for open space purposes" but qualifies that
15 requirement by acknowledging "unnecessary lands which are surplusd."
16

17 Goal 2.7. Retain City owned lands, including excess rights-of-way, for
18 open space purposes. Unnecessary lands which are surplusd should be
19 provided with open space compensation as a part of the land sale.

20 The City has determined the Golf Course is unnecessary based on a survey
21 indicating (1) only 2% of users of the golf course are city residents, and (2) 80% of citizens
22 support selling the property rather than raising taxes or utility rates to finance the debt on
23 the facilities. The Board finds the Goal 2.7 provision for surplusd unnecessary lands
24 modifies the mandate to "retain City owned land" so that the surplusd Resolution is not a
25 *de facto* amendment. The additional qualification that sale of surplusd open space lands
26 "should" include "open space compensation" is not ripe for review.
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31 ²¹ *Your Snoqualmie Valley v. City of Snoqualmie*, GMHB Case No. 11-3-0012, Order on Motions (March 8,
32 2012), at 12-13 (Pre-annexation Agreement in direct conflict with City comprehensive plan provisions was a *de facto* plan amendment).

²² CPSGMHB Case No. 06-3-0031, Order of Dismissal (November 9, 2006).

²³ CPSGMHB Case No. 07-3-0006, Order of Dismissal (Apr. 11, 2007).

1 In sum, the Resolution does not represent a binding commitment of the City to take
2 action in contravention of the Comprehensive Plan. The Resolution is not a *de facto*
3 amendment and the Board lacks jurisdiction to review the petition.
4

5 **Conclusion**

6 The Board finds the Resolution is not within its review jurisdiction as it is neither a
7 comprehensive plan adoption or amendment nor a *de facto* amendment. The City's motion
8 to dismiss is **granted**.
9

10 **III. ORDER**

11 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
12 parties, the GMA, prior Board orders and case law, and having deliberated on the matter,
13 the Board finds:
14

- 15 • City of Sumner Substitute Resolution No. 1378 is neither a comprehensive plan
16 adoption or amendment nor a *de facto* amendment. The Resolution is not within
17 the Board's statutory review jurisdiction.
18

19 The Board ORDERS:

- 20 • Petitioner's Motion to Supplement the Record is granted as to Exhibits 23-25 and
21 denied as to Proposed Exhibits 26-33.
22 • Respondent's Motion to Dismiss is **granted**.
23 • The Petition for Review in *Six Kilns Apartments LLC v. City of Sumner* is
24 **dismissed**.
25 • Case No. 13-3-0005 is **closed**.
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28 Dated this 16th day of July, 2013.
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31 _____
Margaret A. Pageler, Board Member
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Cheryl Pflug, Board Member

Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²⁴

²⁴ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), -840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.